

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

Appeal of Save Our Groundwater
Docket No. 04-17 WC

RECEIVED

AUG 31 2004

MOTION TO DISMISS APPEAL

NOW COMES the Department of Environmental Services ("Environmental Services"), by and through its attorneys, the Office of the Attorney General, and respectfully requests that the Water Council dismiss the above referenced appeal. In support of this Motion, Environmental Services states as follows:

1. This is an appeal of a large groundwater withdrawal permit issued to USA Springs pursuant to RSA ch. 485-C. Save Our Groundwater ("SOG") has raised two issues in its appeal. First, it is appealing Environmental Services' decision on July 1, 2004 to issue a permit to USA Springs. Second, it is appealing Environmental Services' decision on August 9, 2004 to deny SOG's Motion for Adjudicative Hearing.

**Appeal of the Large Groundwater Withdrawal Permit Decision
and the Motion for Adjudicative Hearing is to the Supreme Court**

2. RSA 485-C:21, VI provides the only means by which appeal can be taken of a decision under the large groundwater withdrawal permit statute. Specifically, RSA 485-C:21, VI states:

Rehearings and appeals from a decision of the department under this section shall be in accordance with RSA 541.

3. "Department" is defined as the Department of Environmental Services.

4. RSA 541, which governs appeals in this case, requires (1) a motion for rehearing be filed with Environmental Services (RSA 541:3) and (2) an appeal after a decision on the motion for rehearing can only be filed with the New Hampshire Supreme Court (RSA 541:6).

5. An appeal of USA Springs' permit is directly to the Supreme Court.

6. In addition, an appeal of Environmental Services' denial of the Motion for Adjudicative Hearing is also to the Supreme Court. The request for adjudicative hearing was a procedural request regarding the large groundwater withdrawal process. Although the Motion for Adjudicative Hearing was filed after the permit decision was made, and although there is no process under the statute for holding an adjudicative hearing, even if such a procedure were authorized by the large groundwater withdrawal statute, it is an issue for appeal to the Supreme Court pursuant to RSA 541.

7. Given the specific, unambiguous, language that requires all appeals of large groundwater withdrawal permits go directly to the Supreme Court, the Water Council does not have jurisdiction to hear the appeal filed by Save Our Groundwater.

The Statute Should Not Be Interpreted to Include Words That Are Mere Surplusage

8. If appellant were correct, and an appeal is properly taken to the Water Council, then the provision in RSA 485-C:21 requiring that appeals be taken pursuant to RSA 541 would be rendered meaningless. When interpreting a statute, it should not be construed so as to render the language mere surplusage. There is a presumption that the words of a statute are there for a reason. The statute should not be interpreted to assume the legislature wasted words. *Appeal of Simplex Wire & Cable Co. Inc.*, 131 N.H. 40, 46 (1988).

9. If appellant were correct, then the appeal would proceed to the Water Council. Within the statute governing the Water Council's procedures, the legislature has stated that all hearings are governed by RSA 541-A. *See* RSA 21-O:14. Following that, persons aggrieved may appeal the results in accordance with RSA 541. *Id.*

10. If this were correct, then the appeal process inserted into RSA 485-C:21, requiring that appeals from Environmental Services be pursuant to RSA 541, would be rendered meaningless,

contrary to rules of statutory construction. Under RSA 485-C:21, the appeal is taken directly to the Supreme Court. If the legislature intended that appeals go to the Water Council, then the legislature would have no reason to insert any language governing appeals. If silent, then the appeal would be taken to the Water Council. By inserting the requirement that appeals be taken pursuant to RSA 541, the clear legislative intent is that appeals go directly to the Supreme Court.

SOG Did Not Appeal Within 30 Days of the Decision to Issue a Permit

11. Although Environmental Services' position is that there is no right of appeal to the Water Council, even if there was, the appeal of the permit decision is untimely.

12. Env-WC 203.02 (Time for Filing of Appeals) states "Any appeal shall be filed within 30 days of the date the decision being appealed was issued. As specified in Env-WC 202.04, the appeal shall be deemed to have been filed on the date it is received by the council clerk."

13. The first decision being appealed by SOG is the decision by Environmental Services to grant a permit to USA Springs on July 1, 2004. The thirty-day deadline for filing an appeal was August 2, 2004. There is no grace period under the Water Council's rules for staying an appeal pending a decision on a motion for rehearing.

14. SOG did file a Motion for Rehearing, which was denied by Environmental Services on August 9, 2004. The only provision for seeking rehearing is pursuant to RSA 541, which is the normal process for appealing a large groundwater withdrawal permit decision. The appeal from a denial of a Motion for Rehearing under RSA 541 is to the Supreme Court.

WHEREFORE, for the reasons as stated above, Environmental Services respectfully requests that the Council dismiss the above referenced appeal.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
Department of Environmental Services

By its attorneys,

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Dated: August 31, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Dismiss* has on this 31st day of August, 2004, been mailed first-class, postage prepaid to Armand M. Hayatt, counsel for Applicant, and Bill McCann, Save Our Groundwater, P.O. Box 182, Barrington, NH 03825.


Richard W. Head